UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12

NAPLES COMMUNITY HOSPITAL,
INC.

and Case No. 12-CA-25689

SERVICE EMPLOYEES
INTERNATIONAL UNION
HEALTHCARE FLORIDA

CHARGING PARTY'S ANSWERING BRIEF TO EXCEPTIONS FILED BY RESPONDENT TO THE DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE WEST

Submitted by:

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Charging Party Service Employees International Union, Healthcare Florida, through the undersigned, pursuant to Section 102.46 of the National Labor Relations Board's Rules and Regulations, submits this Answering Brief in response to Respondent's Exceptions and in support of the Decision of Administrative Law Judge John H. West, dated February 4, 2009.[1]

I. STATEMENT OF CASE

In the summer of 2007, registered nurses at two of Respondent's hospitals in Naples, Florida, began organizing a union. Respondent opposed its nurses' organizing efforts from the start and waged a pervasive and increasingly aggressive anti-union campaign marred by "wide spread" unlawful misconduct. (ALJD 84:19-20; 88:41).

This case was tried on August 4-8, 2008, and on February 4, 2009, Administrative Law Judge West (ALJ) issued a decision finding that Respondent committed nine violations of the Act. Respondent has not argued exceptions in regard to six of these violations[2] and does not contest findings of misconduct such as: prohibiting employees from soliciting, distributing, and posting union literature, (ALJD 66:25-28; 67:3-8; 67:43-50; 78: 10-16; 78:24-25; 78: 34-36; 79:3-8); maintaining an overly broad no-solicitation policy, (ALJD 74:9-11; 80:36-39); telling employees they needed Respondent's permission to engage in concerted activities, (ALJD 74:15-20); disciplining employees for posting union literature without Respondent's permission (ALJD 71:34-46; 83:44-46; 84:21-24; 85:25-33); and

[1] Transcript references will be designated in parenthesis with "Tr." and a page number followed by a colon and a line number and the General Counsel's, Respondent's and Charging Party's exhibits will be designated as "GC Ex. _", "R Ex. _", and CP Ex. _," respectively. References to the Administrative law Judge's Decision will be designated as "ALJD" followed by the page, colon, and line number. Respondent's Brief in support of Exceptions will be designated as "RBSE" followed by the page number.

[2] It is unclear from Respondent's Exceptions and supporting Brief as to what parts of the ALJ's decision it contests. In its Brief, Respondent requests that the Board grant exceptions to two allegations, but argues against the ALJ's findings on three allegations. (RBSE 2). Furthermore, it raises issues in its Exceptions that are not argued or supported in any way in its Brief. As Respondent's unsupported statements regarding exceptions do not comply with NLRB Rules and Regulations § 102.45(b)(1), Charging Party will primarily address the three issues that Respondent has argued and supported in its Brief.

soliciting grievances and impliedly promising remedies (ALJD 69:18-20).

Respondent's "wide spread" unlawful conduct (ALJD 84:19-20; 88:41) serves as the back ground for the three allegations to which Respondent excepts: (1) that Respondent changed the working conditions of RN Mary Villani in violation of § 8(a)(3); (2) that Respondent prohibited RN Terese Panebianco from posting union literature in her break room in violation of § 8(a)(1); and (3) that Respondent created the impression that it was engaging in surveillance of Panebianco's union activities in violation of §8(a)(1).

II. ARGUMENT

a. The Administrative Law Judge properly found that Respondent changed the working conditions of Mary Villani by failing to assign her charge duties as it had done previously, as alleged by Paragraph 13 of the Complaint. (Exceptions 8-14, 16-21, 25, 26, 28)

i. The ALJ did not err in concluding that Villani suffered an adverse employment action. (Exceptions 8, 9, 10, 11, 12, 13, and 14)

1. Villani's testimony that her charge assignments decreased was credible, uncontradicted, and corroborated by other witnesses and evidence.

Mary Villani has worked as a registered nurse at NCH for over 27 years and was one of the most active leaders on the union organizing committee. (Tr. 119-22). Villani was considered a "regular charge nurse" in her unit, Surgical Intensive Care (SICU) and earned a pay differential for hours worked as charge). (Tr. 174: 6-9; 200:22-23). Leading up to late November 2007, Villani estimated that she worked as charge nurse approximately 60-75% of the time. (Tr. 178, 200:22-23). Villani testified that her charge nurse assignments decreased dramatically during the winter of 2007-08. Respondent provided no evidence contradicting Villani's testimony regarding the frequency with which was assigned charge duties; indeed, Respondent produced no witnesses who gave any testimony at all on the frequency of

Villani's charge assignments.

Respondent introduced payroll records for SICU that show when Villani worked as charge nurse, but Respondent does not keep records of its charge assignments. (ALJD 52:38-41. Tr. 860, 926-29. R. Ex. 9, 14). SICU nurses sometimes switch the charge assignment if the nurse assigned does not want to work charge. (ALJD 50:37-40; 51:37-38. Tr. 193). Thus the payroll records show a combination of the original assignment and any changes that are made to that assignment by nurses after the shift starts. As discussed below, under a variety of calculation methods, these records show a marked decrease in the number of charge nurse shifts Villani worked during the fall and winter of 2007-2008, which corroborates her testimony that she was assigned fewer shifts as charge during this period.

Villani's co-worker RN Jacque Rasmussen further corroborated Villani's testimony. Like Villani, Rasmussen works on the day shift in SICU. (Tr. 263:13-14; 267:5-9). Rasmussen testified that Villani's charge assignments decreased in the winter of 2007 (Tr. 265:15-16), and Rasmussen was present when Villani complained to a Clinical Coordinator about said decrease. (Tr. 179:1-5). Despite Rasmussen's preference to not be assigned charge—which was known by her clinical coordinators and director (Tr. 189, 264:11-13, 813)—her charge assignments approximately tripled during roughly the same time period that Villani's decreased. (Tr. 265:3-9. R. Ex. 9; CP Ex. B.)

2. The ALJ properly calculated Villani's past charge hours, and in the event that there is any calculation error it is minor and immaterial to the ALJ's finding that Villani's charge hours decreased.

Respondent's exceptions to the ALJ's calculations comparing the hours Villani worked as charge in 2007-2008 are without merit. First, Respondent objects to the ALJ's exclusion of shifts where Villani "floated out" of SICU and was thus unavailable to work as

charge in SICU. (Exception 8). It was reasonable, however, for the ALJ to exclude shifts when Villani floated to another unit, did not work a full shift, or was scheduled for special duties, such as precepting (or training new nurses), which precluded taking on charge duties. [3]

Certainly the ALJ is correct in concluding that Villani is ineligible for charge in SICU when she is floated out. There was no testimony on how floating affects charge assignments or whether clinical coordinators are even aware of which nurses will be floated to their units when they make charge assignments.[4] Respondent's witnesses testified that floating is determined by the clinical coordinator based on a rotation list of unit nurses, and that float decisions are made just before the start of a shift based on current patient census. (Tr. 804: 8-12; 946:18 – 947:2). In addition, testimony regarding the factors that clinical coordinators consider in assigning charge, such as continuity of care based on previous shifts and personal knowledge of the nurses on one's unit, establishes that a float nurse would be at a disadvantage for being assigned charge. (Tr. 744: 5-20; 808:2-19; 764:17 – 765:16).

The second objection Respondent raises to the ALJ's calculations is that there is a difference between how often Villani worked as a charge nurse and how often she worked as charge nurse in SICU. (Exception 9). The ALJ's approach—considering evidence of charge hours worked only when the charge duties were in SICU—was reasonable and is supported by the record, as discussed above, regarding charge assignments, float rotations, and the unlikelihood of being assigned charge in another unit.

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[3] Respondent's sole objection in Exception 9 is the ALJ's exclusion of shifts where Villani was floated out of SICU. Respondent has not provided reasons objecting to excluding shifts where Villani was precluded from being assigned charge because scheduled to be a preceptor or days when she did not work a complete shift.

[4] Renee Thigpin, who does not make or participate in charge nurse assignments, provided one example from July 2007 where Villani floated to another unit and worked as charge nurse there. (Tr. 866). But there is no evidence from that date showing whether Villani was *assigned* charge and this is the only instance Respondent has raised.

Respondent's third objection is that the time periods the ALJ used for comparison were "arbitrarily selected." (Exceptions 11 and 12). Specifically, Respondent objects to the ALJ's supposed omission of Villani's charge duties during the time period from August 13 to 31, 2007. (RBSE 8.) This argument is without merit. First of all, the ALJ did in fact consider Villani's charge shifts in August of 2007 when he calculated specific monthly percentages. (ALJD 87: 25-27). In excepting to the ALJ's alternative methods of calculation (ALJD 52: 46-49, fn 43; 53: 46-49), Respondent has not argued that a three month period or the duration of five pay periods (10 weeks) are each insufficient to establish its past practice of assignments, and has presented little evidence to support its claim that including particular time periods over the summer is necessary.[5] Respondent asserts that the duration of the entire union campaign should be considered, and particularly a period in August 2007 because Villani was a vocal union supporter yet was still assigned charge duties "5 out of 8 shifts." RBSE 8. This is irrelevant, as the fact that Villani was frequently assigned charge duties in the summer and fall while she was a vocal union supporter at the beginning of the organizing campaign is not in dispute.

Moreover, Respondent's objections do not materially affect the ALJ's finding that Villani suffered an adverse employment action. The following chart shows the ALJ's calculations compared to calculations based on Respondent's desired inclusion of shifts

[5] While there is clear payroll evidence from August 2007, Respondent's records appear incomplete in regard to June and July. Respondent has included figures from July 2007 in its calculations (perhaps to focus on the one instance of floating and being assigned as charge). There are several reasons why the figures from June and July 2007 are inconclusive and irrelevant. Exhibit 14 shows that in June 2007 at most five days out the entire month were worked as charge—by all SICU nurses combined. Likewise, according to Respondent's records, in July, only seven days out of the entire month had a charge nurse. Witness testimony, however, established that the Critical Coordinator designates a charge nurse for each shift (see e.g. Tr. 173:15) and although nurses can switch the assignment among themselves, there is no indication that they can disregard it entirely and leave the charge assignment empty. There was no testimony regarding this charge nurse lacunae for June and July 2007, and no witness provided testimony on SICU charge nurse assignments specifically during these months. Furthermore, Villani spent almost the entire month floating to the ICU and as, noted above, witness testimony supports the ALJ's inference that float nurses are generally not eligible for charge. Finally, Respondent has provided no reasons why this month is representative of Villani's previous charge assignments.

worked in other units:

Month	Full Shifts Worked	Shifts worked as Preceptor	Shifts worked as Charge Nurse	**Percentage of available shifts worked as charge nurse (including float shifts)**	*Percentage found by Judge, excluding float shifts from total available shifts*
August	12	5	7	**70%**	*100%*
September	13	3	9	**90%**	*100%*
October	10	1	4	**44%**	*66%*
November	13	0	6	**46%**	*50%*
December	12	0	4	**33%**	*33%*
January	13	9	5	**38%**	*45%*

From Payroll Records in Respondent's Exhibit 9; ALJD 87:14-38.

Respondent claims that the exclusion of float shifts worked on other units "skewered" the ALJ's results (RBSE 7); however, it is clear that even with the inclusion of such shifts (and with the inclusion of the August 2007 time period highlighted by Respondent) there is still a marked decrease in the number of shifts that Villani worked as a charge nurse during the winter of 2007-08. Likewise, as Villani was identified as charge nurse while floating only once, the inclusion of this one instance would only minimally affect overall totals.[6]

The payroll records do not show the actual charge assignments, only hours worked. (ALJD 52:38-41; Tr. 860, 926-29).[7] Nevertheless, Respondent's records corroborate Villani's testimony that her charge assignments decreased in late 2007, under a variety of calculation methods. Respondent has objected to three legitimate ways by which the ALJ considered and compared Villani's past charge hours. (ALJD 52: 46-49; 53:46-49; 87:14-38). But if one simply looks at the total number of hours that Villani worked as charge over the

[6] Additionally, this instance occurred in July, for which Respondent's records appear to be lacking and which is unnecessary to consider in determining the status quo before November. See supra note 5.

[7] Although Respondent has not objected to the ALJ's findings on this aspect, it disingenuously presents payroll records as showing "assignments" (RBSE 6). Likewise, although Respondent presents no argument against excluding shifts when Villani was unavailable to work as charge because she was committed to precepting or not working a full shift, it does not take such facts into account in its own calculations. (RBSE 6-7).

five month period in question—ignoring the ALJ's considerations of floating, precepting and any other exclusions—there is a marked decrease. Villani worked as charge nurse an average of 20.67 hours/week over the eighteen week period from August 5 to December 8. (R. Ex. 9; CP Ex. A). During the six weeks from December 8 to January 19, this fell by 70% to an average of 6 hours/week. (See CP Ex. A).[8]

ii. **The ALJ properly considered and credited testimony regarding charge nurse assignments. (Exceptions 16, 17, 18, 19, 20, 21, 25, 26, 28).**

Respondent further excepts to the ALJ's findings on the issue of Villani's charge assignments based on claims that the ALJ ignored certain testimony and improperly discredited other testimony. (RBSE 8). These exceptions are without merit.

Several witnesses testified about charge nurse assignments, including: Mary Villani (RN, SICU day shift); Jacque Rasmussen (RN, SICU day shift); Edie Alteen (night shift Clinical Coordinator for SICU); Bret McClosky (night shift Clinical Coordinator for SICU); Jonathan Kling (Director of Intensive Care); and Jen Ringle (day shift Clinical Coordinator). Villani, Rasmussen, Alteen, and Ringle all testified that charge nurse assignments are the decision of the clinical coordinator on the previous shift. (Tr. 196, 197, 266, 945-50; ALJD 50:35-36; ALJD 51:34-35; ALJD 51: 51-52). The clinical coordinator designates the nurse assigned to charge by writing the nurse's name on a post it note, which is posted near the

[8] Pay records show that for a two week pay period in mid-November, Villani worked as charge only once each week, which corroborates her testimony that when she received the paycheck for this pay period, she noticed that her pay was lower than usual. (Tr. 177-78, 204) Villani's pay records show that she worked several shifts as charge the following pay period, at the end of November. There is no evidence directly contradicting her testimony that she was not assigned during this period, as she could have worked as charge based on SICU nurses' internal decisions to switch assignments. It is also possible that her recollection at the hearing, eight months later, was off by a week or so. Villani's statement to the Naples Daily News (in mid January) stated that the change in assignments had started sometime "last month," which would indicate December rather than late November. (ALJD 50:50 fn 42. GC Ex. 21). Beginning December 6, pay records establish that Villani's charge hours did in fact markedly decrease: she worked charge only twice over the next forty-four day period, which corroborates her testimony that she was assigned charge only twice during a period of several weeks that ended in late January. (Tr. 178).

time clock. (Tr. 192:11-18; 267:10-14; 745:21-5; 771:7-9; 949:15-17). The night shift clinical coordinators for SICU, who designate and post charge nurse assignments for the day shift, are Edie Alteen and Bret McClosky. (Tr. 809:8-10).

Alteen gave detailed testimony about how she assigns charge nurse duties. She explained that she "collaborates" with the night shift charge nurse, such as by asking questions about staff on previous shifts (Tr. 948: 3-7). Alteen also takes "input" from night shift charge nurses regarding nurses' preferences for assuming charge duties, although Alteen herself is also aware of some nurses' preferences (Tr. 14-21). Alteen testified that "sometimes" the charge nurse will make a "recommendation" based on which nurse would like to be charge. (Tr. 948:22 – 949:1). Alteen, however, generally works an opposite schedule from Villani, and so she doesn't often assign charge on the day shift when Villani is working. (Tr. 950: 17-20). Thus Alteen could not estimate on average how often Villani was assigned as charge nurse. (Tr. 950:17).

Kling testified primarily about his past experience as day shift clinical coordinator, and explained that he "collaborated" with the day shift charge nurse about whom should be assigned charge for the night shift. (Tr. 806:12). Kling detailed several factors that he considered in determining charge assignments, including the previous shift's charge assignment, continuity of care, present patient acuity levels, census, nurses' preferences for assuming charge duties, nurses' skill levels and patient needs. (Tr. 806:13-16; 808:6; 808:6; ALJD52:22-24). Although he did, as Respondent cites, testify that Alteen and McClosky "assign who the night shift charge nurse recommends," that statement must be considered in the context of Kling's entire testimony, his personal knowledge of the issue, and others' testimony. It carries less weight than Alteen's testimony on this issue because Kling works

on the day shift and does not actually make the charge assignments in question. Notably, his description of how Alteen assigns charge is different from Alteen's own testimony.

Like Kling, Ringle works on the day shift and testified about assigning charge nurse for the night shift: she considers various factors such as seniority, nurse expertise and experience, communication, ability to handle stress, people skills. (Tr. 744:5-12; 745:16-18). Ringle does not take recommendations from the day shift charge nurses for night shift charge assignments. (Tr. 745:11-13). Kling, however, testified that Ringle does get recommendations from staff: she will "talk with staff and get their opinion and then make an assessment based on who's there and the recommendation of staff." (Tr. 809:5-7). Thus Kling's testimony regarding both Alteen and Ringle's methods of assigning charge nurse was incorrect.

With the exception of McClosky, the clinical coordinators who testified were willing and able to answer questions about what factors go into assigning charge nurses, even when such assignments were made in collaboration with charge nurses on the preceding shift. McClosky, however, repeatedly claimed ignorance, stating that he didn't know what factors were considered. (ALJD 89:17-18; Tr. 986:1-5). Specifically, he denied any knowledge as to whether charge assignments take into account nurse preferences and balancing workload, which other clinical coordinators acknowledged. (ALJD 89:14-18; Tr. 984: 22 – 985:2; Tr. 986:1-5). Despite his admitted role in charge assignments—writing the name of the charge nurse assigned for day shift and posting it near the time clock—McClosky could not remember or even estimate how often Villani was assigned to charge prior to November, after November, on average per week, or whether she works as charge at least once per week (ALJD 89: 29-34; Tr. 982:6-8; 982:17-25; 984: 15).

The ALJ did not "mischaracterize" McClosky's testimony. Rather, the ALJ found that McClosky's "demeanor was that of a person who was not interested in supplying even the essentials necessary to determine whether his testimony was credible." (ALJD 89: 42). McClosky's testimony was different from other witnesses' testimony —including that of Kling and Alteen—and their descriptions of the clinical coordinator's assignment duties did not corroborate his account. "Other clinical coordinators discuss the charge assignments with a charge on another shift. Respondent did not show that any other clinical coordinator in either of its hospitals lets an employee make the charge assignment decisions and the clinical coordinator has no idea what's going on." (ALJD 89:42 – 90:2).

The ALJ's discrediting of McClosky's testimony was explicitly based on "testimony and demeanor" rather than the lack of corroboration. (ALJD 90:12-20). The ALJ merely noted that Respondent had an "additional avenue" to support its claim that it was not responsible for the decrease in Villani's charge assignments. (ALJD 90:13-17). Respondent has failed to show that the ALJ's credibility resolutions regarding McClosky's testimony and demeanor are contrary *any* evidence, let alone a clear preponderance of all the evidence. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, 545 (1950) enf'd 188 F.2d 362 (3d Cir. 1951).

b. The Administrative Law Judge properly found that Respondent unlawfully prohibited employees from posting or having union literature in the employee break room/kitchen area, as alleged in paragraphs 5 and 6 of the Complaint. (Exceptions 3, 4, 5, 23, 27, 29)

Respondent's exceptions to the ALJ's credibility findings regarding witnesses Terese Pannebianco, Mark Pitts, and Jennifer Todd, and to his finding that personal notices were posted on the break room refrigerator, are without merit. (ALJD 63:33-34) The ALJ properly credited the testimony of Panebianco and discredited the testimony of Pitts and Todd.

Terese Panebianco is a registered nurse who has worked for Respondent since 1991. (Tr. 378). For the past ten years, she has worked as a charge nurse on the Pre-Admission Unit, which shares a kitchen/ break room area with adjacent departments Occupational Health and the Blood Donation Center. (Tr. 379). Respondent witness Mark Pitts is the Employee Health Coordinator who manages Occupational Health and supervises respondent witness Jennifer Todd, a customer service representative. (Tr 108:4-8). Todd sits at a desk at the front of Occupational Health's office. (Tr.781:5-8).

Panebianco testified that, prior to the union organizing campaign, she had seen a variety of non-work-related items posted on the refrigerator in her break room: "uniform sales, bake sales, baby showers, Christmas parties, just general information we want to communicate with other departments." (Tr. 381, ALJD 63:15-18.) There is no other place in the break room to post notices. (Tr. 379: 15-19; 380:2-3). On August 6, 2007, Panebianco posted a union flyer on the refrigerator at the beginning of her shift. (Tr.381). About an hour later, she stopped in the break room to get her breakfast out of the refrigerator and noticed that the flyer she had posted was gone and there were anti-union flyers posted in its place. (Tr. 382). Panebianco returned to her office and called Pitts to ask if someone in his office, which is directly across from the break room, had seen the person who removed the union flyer. (Tr. 382). Pitts responded: "I'm not going to speak to you about that, I've reported you to Human Resources." (Tr. 383). Panebianco asked "Are you watching me?" and Pitts responded "Yes, I'm watching you and I'm monitoring your activities." (Tr. 383-84).

Panebianco hung up the phone and immediately called Brian Settle, Chief Human Resources Officer, to discuss what Pitts had said to her. (Tr. 383). She was unable to reach Settle, but she left him a message, and he stopped by her office at approximately 4 pm.

Panebianco told Settle that "I had spoken to Mark Pitts in the morning and he told me that he was watching and monitoring my activities, and that I felt harassed and intimidated by it because he's not my Director and he's not my supervisor." (Tr. 384-85). Settle responded that managers "were told to keep their eyes open." (Tr. 385.) Panebianco asked Settle why the union flyer was taken down and Settle replied that employees "were not allowed to have Union pamphlets in the break room on the refrigerator." (Tr. 385). He offered no explanation for why posting union material was prohibited. After her conversation with Settle, Panebianco did not post any more union flyers in her break room. (Tr. 385:17-25; 286:1-2; ALJD 12:18-19).

Shortly thereafter, Panebianco memorialized in writing her conversations with Pitts and Settle, and gave these notes to union organizer Caleb Jennings. (CP. Ex. 2; ALJD 12:22-25 fn 11; 12:40-52). The next day, on August 7, she wrote an email to Settle to register a written complaint about Pitts's behavior. (Tr. 385:9-16; 399:11-15; GC Ex. 12). Both Panebianco's contemporaneous written notes and her August 7 email to Settle are consistent with her testimony, and each describe Pitts's comments that he was "watching" her and "monitoring [her] activities." (CP Ex. 2, GC Ex. 12). In the email to Settle, Panebianco wrote that she felt that Pitts was harassing her and trying to intimidate her. (GC Ex. 12, ALJD 12:15-16). Panebianco also testified that she did not take down any notices from the break room refrigerator on August 6. (Tr. 386:3-7; 415:20-25; ALJD 13:11-13).

Respondent's witnesses provided contradictory accounts of what happened on August 6, and the ALJ properly discredited their testimony, finding their allegations against Panebianco to be a "fabrication." (ALJD 63:20-29). Todd testified that on that morning she heard a "ripping sound" coming from the break room, which is across the hall from

Occupational Health. (Tr. 784). She looked out of the door to the Occupational Health offices, and saw the back of a person walking down the hallway, away from the break room and from Occupational Health. (Tr. 784). Todd left her desk and walked into the hall, which was empty. (Tr. 785). Then she went into the break room and saw "one of our NCH signs" "ripped and crumpled" in the trash can. (Tr. 785). She took it from the trash can and brought it to Pitts. (Tr. 787). Later that day, in the hallway on the way to lunch, she saw Panebianco and was able to identify her as the person who walked by the door that morning, even though she had only seen that person briefly from behind. (Tr. 789).

Pitts testified that on the morning of August 6, Todd came into his office and told him that "she heard...out of the break room, kitchen area, the fliers coming down and ripping." (Tr. 973) According to Pitts, Todd also told him that she had seen someone walk by the break room immediately before the ripping sound and that the "fliers that [he] had put up earlier were ripped up and she said she had checked them." (Tr. 973). According to Pitts, after Todd notified him, he followed her back to the break room where he "looked in the wastepaper can and found my fliers..." (Tr. 975). Contradicting Todd's testimony, Pitts insisted that there were multiple flyers in the trash can and that Todd did not bring the flyers to him but rather that he went to the break room and retrieved the flyers himself. (Tr. 973).

That same morning, after his phone conversation with Panebianco, Pitts composed an email message to Brian Settle alleging that Panebianco had torn down Respondent's anti-union postings. (Tr. 964:22 – 965:4). "We have the door open to our office today and have seen Tressa Panebianco...walk by our office to the break room several times. The last time, our secretary saw her walk by, then she heard a sheet of paper rip and our secretary went in the break room and noted the "Here are the Facts" sheet was missing off the refrigerator."

(GC Ex. 12). This message was sent on August 6 at 11:39 am—"before lunch" according to Pitts (Tr. 964:21 – 965:2)—yet both Todd and Pitts testified that Todd first identified Panebianco as the person from the hallway until she and Pitts were walking to the cafeteria for lunch. (Tr. 789:5-6; 960:2-6; 970:11-12).

The ALJ properly discredited Pitts and Todd's testimony because the multiple conflicts between their accounts revealed that their story was a "fabrication." (ALJD 63:17-30). The ALJ detailed the specific and numerous inconsistencies: "their stories conflict regarding Todd taking the ripped document out of the trash can, Todd bringing the ripped document to Pitts in his office, Pitts leaving his office after Todd spoke to him, Pitts going to the break room, Pitts seeing the ripped document in the trash can, the length of hair of the person who allegedly walked by OH, and whether the person was seen walking by OH before or after the alleged ripping sound was heard." (ALJD 63:20-24.)

Respondent absurdly suggests that if one party presents witnesses who contradict each other's testimony, a judge may not discredit both witnesses because in order "to discredit [one], he had to credit the testimony of [the other]" and vice versa. The numerous inconsistencies and contradictions between Pitts and Todd's testimony support the ALJ's finding that their allegations against Panebianco were a fabrication and that neither was credible. Respondent has failed to show that the ALJ's credibility decisions regarding Pitts and Todd are contrary to the preponderance of all the evidence. *Standard Dry Wall*, 91 NLRB at 544.

Based on the above "fabrication," the ALJ did not find Todd and Pitts credible on the issue of refrigerator postings. The ALJ credited Panebianco's testimony that employees had previously been allowed to post "uniform sales, bake sales, baby showers, Christmas parties,

[and] general information we want to communicate with other departments" on the break room refrigerator. (Tr. 381, ALJD 63:15-18.) Panebianco's testimony was consistent and matched her contemporaneous written accounts. (ALJD 12:22-25; 12:36-51, fn11; 63:32-33). Additionally, as noted by the ALJ, Respondent's general practice was to allow employees to post personal items on employee lounge bulletin boards. (ALJD 63:34-38).[9]

c. The Administrative Law Judge properly found that Respondent created the impression of surveillance as alleged in paragraphs 5 and 6 of the Complaint. (Exception 3, 4, 5, 22, 29)

Respondent's exceptions to the ALJ's finding that Respondent created the impression of surveillance are without merit. The ALJ properly credited the testimony of Panebianco and did not err or misinterpret Board precedent in finding that Pitts and Settle created the impression that Panebianco's union activities were under surveillance. (ALJD 64:4-17).

The Board's standard for determining whether an employer has created an impression of surveillance is "whether the employee would reasonably assume from the statement that his union activities had been placed under surveillance." *U.S. Coachworks, Inc.*, 334 NLRB 955, 958 (2001); *United Charter Service*, 306 NLRB 150 (1992). In the context of a conversation about posting union literature, Pitts told Panebianco that he was "watching" her and "monitoring [her] activities." (Tr. 383-84). Based on this statement, Panebianco

[9] Todd also testified that she had never been informed that she was not allowed to post personal notices on the refrigerator. (Tr. 796: 25 – 797:1-2). Additionally, Pitts and Todd's testimony on refrigerator postings was not entirely consistent. Todd testified that she has never seen non-work postings on the refrigerator and that she uses the refrigerator on average "a couple of times a day." (Tr. 796:19-24 (emphasis added); 793:10). This included August 6: Todd did not recall any notice being posted in place of the allegedly torn-down anti-union posting. (Tr. 787:10-11). In contrast, Pitts testified that for approximately the week prior to the August 6 incident, non-NCH "union information" was posted "many, many times" in place of Respondent's anti-union notices. (Tr. 956: 10-20).

reasonably assumed that her union activities were under surveillance. It is difficult to imagine what other assumption an employee could make in the face of Pitts's statement.

Respondent claims erroneously that "there can be no impression of surveillance violation against an employee who openly supports a union in the workplace." (RBSE 14). [10] Employers, however, plainly do not have carte blanche to spy on employees provided that they spy only on those employees who openly engage in concerted activity. *See United Charter Service*, 306 NLRB at 151.

The cases cited by Respondent involve employer interrogations or statements regarding an employee's union stance that are inferred to mean that the employer is engaging in surveillance. An employer's statement of knowledge regarding an employee's public pro-union stance does not reasonably imply that the employer was engaged in surveillance or "monitoring employee conversations," unless there is further context suggesting such monitoring. *SKD Jonesville Division, L.P.*, 340 NLRB 101, 102 (2003). In determining both surveillance and interrogation violations, "where the union activities of the particular employee involved were well known, a comment to that effect does not violate the Act." *Diversified Products*, 272 NLRB 1070, 1077 (1984)(finding that where supervisor told openly pro-union employee that he knew employee was passing out union cards, that comment alone did not violate the Act).

Here, Panebianco was not inferring surveillance from the fact that Pitts knew she was pro-union or that he mentioned that she posted a pro-union flyer in the break room. Indeed,

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[10] Respondent's objection to the ALJ's finding that Panebianco is a credible witness is discussed above and rests solely on its claims about Todd's credibility; Respondent does not attempt to argue that Pitts is a credible witness. Thus the only distinct issue raised in regards to surveillance is a legal question.

she did need to infer anything at all, because Pitts told her straight out that he was "watching" and "monitoring" her. (Tr. 383-84).

Pitts not only informed Panebianco he was monitoring her, but also documented said monitoring in an email exchange with Brian Settle that same day with the subject line "union pamphlets." (GC Ex. 12.) He wrote that he "monitor[s] all employee behavior" and was monitoring activities specifically in regard to posting of union material. *Id.* Pitts admitted that he was watching Panebianco specifically: "We have the door to our office open today and have seen Tressa Pannebianco from Pre Admission Testing come by our office to the break room several times.... At 11:30, it was reported to me, Tressa was coming out of the Blood Bank. To me it seems Tressa has too much time on her hands. Please nip this in the bud ASAP." *Id.*

Pitts had no legitimate work-related reason for monitoring Panebianco. Pitts does not supervise Panebianco in any capacity. (Tr. 968:2-3). Nor did he have any cause to suspect that did she not have legitimate reasons to be going into the Blood Bank. (*See* Tr. 379: 17-18; 403:17). Contrary to Respondent's suggestion that Pitts merely engaged in "a supervisor's routine observations" (Br. 15), Pitts himself testified that there would be no reason why anyone would report Panebianco's activities to him unless something out of the ordinary happened, such as if she "collapsed in the hallway." (Tr. 971.) Pitts even wrote to Settle in their August 6 email exchange: "I'm sure Teress felt we were watching," admitting the reasonableness of Panebianco's assumption that her union activities were under surveillance. *Id.*

Based on Pitts's August 6 email exchange with Settle and other high level managers (GC Ex. 12) and on Panebianco's email to Settle on August 7 (GC Ex. 12), Respondent was

aware of both Pitts's conduct and the result that Panebianco felt intimidated and harassed, yet failed to respond appropriately. Instead, Settle confirmed Panebianco's reasonable assumption that her union activities had been placed under surveillance by telling her that "managers had been instructed to keep their eyes open" with no further explanation and no denouncement of Pitts's actions. (Tr. 109, 385; ALJD 64:4-17).

d. The Administrative Law Judge properly required Respondent to notify employees that they do not need permission to engage in solicitation or distribution on non-working time and in non-work in the Order and Notice. (Exceptions 30, 31)

Respondent excepts to the ALJ's inclusion in the Order and Notice of the requirement that Respondent notify employees, after it corrects its impermissibly broad no-solicitation policy, that employees no longer "have to request permission to engage in solicitation or distribution on the employee's own time in a nonwork area." (ALJD 92:47; 93:4-5; 96:14-17.) Such an Order and Notice is proper under the circumstances.

The Board has broad remedial authority to implement remedies that will cleanse the workplace of the coercive effects of an employer's misconduct. *See, e.g. Monfort, Inc. v.* NLRB, 965 F.2d 1538, 1543 (10th Cir. 1992) *enforcing* 298 NLRB 73 (1990); *High-Point Construction Group*, 342 NLRB 406, 408 (2004); *Fieldcrest Cannon, Inc.* 318 NLRB 470, 473 (1995) *enforcement granted in part and denied in part*, 97 F.3d 65 (4h Cir. 1996). Such authority includes affirmative action where necessary to "dissipate fully the coercive effects of the unfair labor practices." *Fieldcrest Cannon*, 318 NLRB at 473.

As Charging Party has argued in its Cross-Exceptions to the ALJ's decision, and as is evident from the multiple violations of the Act described in the ALJ's decision, Respondent committed pervasive and flagrant violations of the Act. Particularly relevant to this remedy is that Respondent promulgated a policy that required employees to request and receive

permission before soliciting, distributing, or posting on their own time in non-working areas. (ALJD 79:10-19; 81:24-25. GC Ex. 9). Respondent redistributed this policy, with explicit language requiring Respondent's permission for employee solicitation and distribution, to employees, supervisors, and managers in the middle of the union organizing campaign. (ALJD 27:40-42; 36:51 – 37:20. CP Ex. 14). Respondent further instructed employees individually that they needed permission to engage in concerted activities and repeatedly prohibited them from doing so in non-work areas on non-working time. (ALJD 36:12-14; 74:15-20; 77:41-43. Tr. 388:9-11). Last but certainly not least, Respondent went so far as to discipline employees for distributing and posting union materials without its permission, basd on a policy that said such requests for permission would be "routinely denied." (ALJD 71:34-46; 83:44-46; 84:21-24; 85:25-33).

The above conduct was particularly flagrant in that Respondent had not previously enforced its policy in this fashion and in fact broadened its implementation of the policy deliberately to target pro-union employees. Despite its ten year history of allowing "all kinds of non-NCH postings," Respondent began removing union postings and disciplining union supporters "without prior warning to its employees." (ALJD 73:27-33). Employees "were either not allowed to solicit in a nonwork area or were disciplined when they did." (ALJD 80:32-33).

In light of Respondent's unlawful conduct, a remedy that requires Respondent merely to correct the policy on its face and rescind disciplinary points unlawfully awarded would be insufficient to "to convey the message to all employees...that the Respondent is serious about remedying [its] unlawful conduct." *Fieldcrest Cannon, Inc.* 318 NLRB at 473. After all Respondent has done to stifle protected communication among nurses—including

intimidating, harassing, and disciplining employees who solicit, distribute, or post in nonwork areas on non-working time—the ALJ's Order and Notice requiring Respondent to take affirmative steps to inform employees of their rights is necessary and proper.

III. CONCLUSION

Based upon the foregoing, we respectfully request that the exceptions filed by Respondent by denied in their entirety.

Dated at Hollywood, Florida, this 20th day of April, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached CHARGING PARTY'S ANSWERING BRIEF TO EXCEPTIONS FILED BY RESPONDENT TO THE DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE WEST is being filed electronically with the National Labor Relations Board at www.nlrb.gov, and duly served electronically upon the following named individuals on the 20th day of April, 2009.

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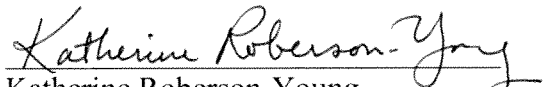

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